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No. 04-637

In The
Supreme Court of the United States

MARGARET BRADSHAW, Warden,
Petitioner,

v.

JOHN DAVID STUMPF,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the presumption of regularity normally accorded counsel's representations during a plea colloquy may be rebutted, in part, by contrary evidence within the same colloquy and evidence outside the record.

2. Whether due process requires the re-evaluation of a defendant's conviction and death sentence when the prosecutor repudiated the theory and evidence used to secure that defendant's conviction and sentence in order to try and convict a second defendant.

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INTRODUCTION

John Stumpf is the only party to this case who has been consistent throughout every stage of this case. Stumpf has always maintained that he did not fire the shots that killed Mary Jane Stout. The state, however, secured Stumpf's conviction and death sentence for aggravated murder by grounding Stumpf's guilty plea on the theory that he killed Mrs. Stout. The same prosecutor then prosecuted Stumpf's accomplice, Clyde Daniel Wesley, for aggravated murder, and embraced the position that Wesley had shot and killed Mrs. Stout. Indeed, the prosecutor structured his entire case to bolster and prove the version of the crime delivered by Wesley's cellmate, James Eastman. Eastman's testimony mirrors Stumpf's long-held position. The Wesley jury, however, confronted with Stumpf's plea and death sentence for the same crime, refused to follow the prosecutor's lead and convict and sentence to death a second man for the same crime. Stumpf attempted to withdraw his guilty plea and vacate his death sentence, but the reviewing panel refused to do so. Until the Sixth Circuit granted relief, Stumpf sat on death row despite the fact that the weight of the evidence indicated that he was not even in the room when Mrs. Stout was killed.

The Sixth Circuit granted full relief on two separate grounds. The court determined that the record could not fairly support a conclusion that Stumpf's guilty plea reflected a voluntary, knowing and intelligent waiver of his constitutional rights. In accord with this finding, the court set aside Stumpf's guilty plea and death sentence. The court also determined that the state violated Stumpf's due process rights when it failed to review and correct his conviction and sentence after employing inconsistent and irreconcilable theories to convict Stumpf and Wesley. The court determined that the nature of the due process violation required it to set aside both the guilty plea and death sentence on this ground as well. The facts, the law, and the demands

of justice fully support every aspect of the court's reasoning and holdings.

The court held Stumpf's guilty plea invalid only after an exhaustive review of the record. Following this Court's precedents, the Sixth Circuit first determined whether the evidence Stumpf offered in support of his challenge to the guilty plea raised legitimate doubts about the validity of his guilty plea. After the court determined that Stumpf had raised and supported serious doubts about the validity of the plea, the court proceeded to consider the state's evidence of a valid plea. The state offered the record of the plea colloquy. The court explicitly noted that a reviewing court owes such a record a presumption of regularity. In this case, however, the court determined that the record of the plea colloquy could not sustain the presumption, because it offered more evidence of an invalid plea than it offered of a valid plea. The Sixth Circuit concluded that a confused and contradictory plea colloquy record, which is also contradicted by ample extrinsic evidence of an invalid plea, erodes the trust a reviewing court would normally place in the representations made on that record. In addition, because the state failed to offer any other evidence of a valid plea, the court was left with nothing but uncontradicted evidence of a constitutionally invalid plea.

At its simplest, the issue before this Court is whether it was proper for the Sixth Circuit to review the record of the plea colloquy for regularity. Petitioner characterizes the presumption of regularity such a record usually enjoys as effectively irrebuttable. According to Petitioner, the court must read the record only for whatever confirmations are found therein and disregard any internal contradictions that may contravene those confirmations, because the court may only rely upon direct extrinsic evidence of an invalid plea. Under this theory, a reviewing court must ignore the record as well as the surrounding facts and circumstances. Neither the precedents of this Court, nor the demands of simple justice, support Petitioner's attempt to prevent reviewing

courts from *reviewing* the record. The Sixth Circuit conducted a proper review of the entire record and held that the record did not fairly support a finding that Stumpf's plea was voluntary, knowing and intelligent. Therefore, the court vacated the plea.

The Sixth Circuit also held that the prosecutor's use of inconsistent theories in an attempt to obtain convictions and death sentences against both Stumpf and Wesley, and his subsequent failure to correct that inconsistency by offering Stumpf either a new plea or at the very least a new sentencing hearing, violated Stumpf's due process rights. The court specifically found that the state had taken the firm position at Wesley's trial that Wesley had shot Mrs. Stout. In support of this position, the prosecutor offered a great deal of evidence, including Eastman's testimony, that confirmed Wesley's role as the principal offender. The court determined that the use and subsequent failure to correct these inconsistent prosecutorial theories violated the principle of fundamental fairness the Due Process Clause protects. The court then found that the state's contention that the positions were not inconsistent because neither conviction turned on the identity of the shooter contradicted the clear requirements of Ohio's aggravated murder statute. Stumpf's conviction and death sentence, according to the judicial panel that reviewed and entered his plea, hinged on his status as the principal offender. Once the state undermined that conclusion, Stumpf's plea no longer satisfied the intent requirement; therefore, the conviction and death sentence lost all credibility. The court dismissed the state's habitual counter-argument that Eastman's testimony did not affect Stumpf because Eastman lacked credibility—a position adopted below by the Supreme Court of Ohio and the district court—because no court since the Wesley trial had actually seen the testimony; therefore, these courts could not base an entire decision on a finding that Eastman lacked credibility. The Sixth Circuit's decision is further supported by the fact that both the Ohio Supreme Court and Wesley's jury—in

rejecting Eastman's testimony—mistakenly believed that Stumpf had admitted to being the actual shooter when he pleaded guilty to aggravated murder.

The Sixth Circuit's decision to vacate Stumpf's plea and sentence on this claim ultimately relies on a single determination: the state took materially inconsistent positions. The court's reasoning and holding follow from that one fact. When the state embraced the position that Wesley was the shooter it directly contradicted the position it had advocated before Stumpf's plea and sentencing panel. Indeed, at that point, the state came around to Stumpf's own position. The prosecutor then left this contradiction uncorrected; indeed, he fought to preserve it in the face of Stumpf's motion to withdraw. At root, that festering contradiction was the due process violation. The uncorrected contradiction violated Stumpf's due process rights because it rendered both his conviction and death sentence unreliable. Thus, once the Sixth Circuit determined that the prosecutor had embraced materially inconsistent positions, positions that he then failed to correct, no choice remained but to vacate both the plea and the sentence.

STATEMENT OF THE CASE AND THE FACTS

A. Facts concerning the crime

On May 14, 1984, Stumpf, Clyde Daniel Wesley and Norman Leroy Edmunds met in Stumpf's home and drove along Interstate 70 through Guernsey County, Ohio. Edmonds pulled over because the car was low on fuel and no one possessed money for gas. In response, Wesley, armed with multiple weapons, urged that he and Stumpf enter a nearby home and hold-up the residents. Stumpf accompanied Wesley to the home of Norman and Mary Jane Stout. Edmonds remained in the car. When they reached the front door, Wesley knocked and asked Mr. Stout if he might use the phone. Once he gained entry, Wesley pulled out two

hand-guns and corralled the Stouts into a bedroom. (Sixth Circuit Opinion, Pet. App. at 4-5a).[1]

Wesley left Stumpf to watch the Stouts. The Stouts sat down on the bed and Stumpf kept the gun that Wesley had given him on the couple. As the minutes stretched and mounted, Stumpf grew agitated. At some point, Mr. Stout stood up from the bed and moved on Stumpf. Mr. Stout was shot in the head, but he continued toward Stumpf. Mr. Stout and Stumpf struggled together, and in the struggle Mr. Stout received another shot to the head. Mr. Stout fell to the floor. A short time later, Mrs. Stout was shot and killed. Mr. Stout survived. (*Id.*).

Stumpf has consistently maintained, and the state's evidence at Wesley's trial supports, that after shooting Mr. Stout, Stumpf dropped his gun and ran out of the house through the garage. Mrs. Stout was still alive when Stumpf ran from the house. Wesley soon followed and called Stumpf back into the garage. Edmunds had already fled with the car and Wesley ordered Stumpf to drive the Stout's car. All three men returned to Pennsylvania and were later arrested. Stumpf eventually admitted to shooting Mr. Stout, but he denied any knowledge of Mrs. Stout's shooting. He told police then, and he has maintained ever since, that he was not in the house when Mrs. Stout was shot and killed. (Joint Appendix at 176-79).

B. Guilty plea colloquy

On September 17, 1984, the Guernsey County prosecutor informed the court that a plea agreement had been reached. The trial court conducted a plea colloquy during which Judge Henderson attempted to determine whether

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari. "J. App." refers to the Joint Appendix to this Court. "Cir. Ct. App." refers to the Joint Appendix to the Sixth Circuit. "Wesley Trans." refers to the transcript of the Wesley trial.

Stumpf was in a position to offer a voluntary, knowing and intelligent plea. During the colloquy, defense counsel Tingle represented that he had explained to Stumpf the elements of the charges, the available defenses, and Stumpf's rights under the Ohio and United States Constitutions. (J. App. at 135). At no point were the specific elements of the charges gone over with Stumpf.

When Judge Henderson asked Stumpf if he understood the rights he was surrendering, Stumpf bucked and a confused exchange between the judge and Stumpf's attorney followed.

> ATTORNEY STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.
>
> JUDGE HENDERSON: I understand that and I appreciate you bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?
>
> ATTORNEY STEPHENS: Yes, sir.

(*Id.* at 140).

Satisfied with Stephens' answer, and without directing any inquiries to Stumpf, Judge Henderson continued with the colloquy.

> JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?
>
> ATTORNEY STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.
>
> JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?
>
> STUMPF: Yes, sir.

(*Id.* at 142). Stumpf subsequently swore in a post-conviction affidavit that he did not understand this specific exchange. (*Id.* at 302). The court ultimately accepted and finalized Stumpf's guilty plea. (Cir. Ct. App., Vol. I, at 213-16).

C. Evidentiary and sentencing hearings

On September 18, 1984, the trial court conducted an evidentiary hearing in which the prosecutor was required to present the factual basis for the guilty plea that the court had entered the previous day. In his opening, the prosecutor took the position that Stumpf shot Mrs. Stout:

> Believing that he had killed Mr. Stout, this defendant then turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times.

(J. App. at 152).

In his opening statement, defense counsel accepted the bulk of the prosecutor's characterization of the crime. However, defense counsel indicated an intention to challenge the assertion that Stumpf shot Mrs. Stout at some later point in the proceedings. (*Id.* at 155).

The state presented numerous witnesses in support of its theory that Stumpf was the principal offender. At the close of the state's presentation, defense counsel informed the court, "[i]f the Court please, on behalf of the defendant at this time we do not intend to offer any evidence at this time." (Cir. Ct. App., Vol IV, at 1997). Rather, defense counsel moved for acquittal on all charges. (J. App. at 157). The prosecutor responded, "[t]here's ample evidence to conclude that this defendant fired all the shots that hit anybody." (*Id.* at 158). Defense counsel was asked, once again, if it had anything more to offer. Counsel responded, "[n]ot on this question, your Honor." The court denied the motion to acquit. (*Id.* at 159).

Defense counsel subsequently renewed its motion for a "judgment of acquittal notwithstanding the entry of the pleas" and added a second motion to "eliminate from the potential penalties available in this case the death penalty." (*Id.* at 160). Only at this time did defense counsel offer its

argument that Stumpf did not kill Mrs. Stout. (*Id.* at 160-63). The court denied the second motion. (*Id.* at 167).

During the sentencing hearing, Stumpf's counsel attempted to prove that Stumpf did not have a significant criminal history and that he had a difficult childhood, a limited education and a dependable work history. (Cir. Ct. App., Vol. IV, at 2034-2133). Stumpf also gave an unsworn statement in which he stated that he shot Mr. Stumpf, and then left the house. (*Id.* at 2137). Wesley followed him out of the house shortly thereafter. (*Id.*).

After the sentencing hearing, the court imposed the death penalty. In support of its decision, the court offered, "[t]he Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment." (*Id.* at 196).

D. Clyde Daniel Wesley's trial

A short time after Stumpf had been convicted and sentenced to death the same Guernsey County prosecutor prosecuted and convicted Clyde Daniel Wesley for the murder of Mrs. Stout. In his opening statement, the same prosecutor now adopted Stumpf's version of the crime as his own:

> Believing that he has killed Mr. Stout, John David Stumpf pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point this defendant [Wesley] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime they thought they had committed in the other killing they thought they had committed.

(J. App. at 226). To prove that Wesley had been the principal offender, the prosecutor offered forensic evidence, the

testimony of various witnesses, including Mr. Stout, and most significantly, the testimony of Wesley's cellmate, James Eastman.

The core of Eastman's substantive testimony offers a version of events that tracks Stumpf's own version:

> EASTMAN: And Stumpf—well, the man, Mr. Stout, I guess, he lunged at Mr. Stumpf and Wesley told him to shoot him. He shot him. I guess he fell down and then I guess Mr. Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess they was getting the rest of the stuff they was taking out of the house, they was going downstairs getting ready to leave. As they was turning to leave I guess they heard her moan or say something and then he said he turned around and shot her again.

(*Id.* at 241). The prosecutor bolstered Eastman's credibility on direct, and repaired it on redirect, by eliciting the fact that Eastman had not come forward in order to procure a deal for himself. (*Id.* at 244, 264).

The force of Eastman's testimony, however, was severely undermined when Wesley entered Stumpf's guilty plea and death sentence into evidence. (Wesley Trial Trans. at 2681-82).

In his closing argument, Wesley's defense attorney reminded the jury of Stumpf's plea and sentence, mistakenly implying that Stumpf's plea necessarily indicated that he shot Mary Jane Stout. (*Id.* at 3152-53).

Defense counsel referred to these exhibits and the fact that Stumpf had already claimed responsibility for the murder of Mrs. Stout, numerous times during his closing argument. (*Id.* at 3152, 3155, 3157, 3158, 3163). In fact, defense counsel made Stumpf's guilty plea and death sentence the last substantive point he made to the jury. (*Id.* at 3165).

This pattern extended into the sentencing phase. Defense counsel continued to refer to Stumpf's guilty plea and the fact that someone had already been found to be the principal offender. (*Id.* at 3326, 3331, 3335, 3339). The jury found Wesley guilty of aggravated murder but refused the principal offender specification. (*Id.* at 3366). After failing to secure a guilty verdict on the principal offender specification, the prosecutor emphasized at sentencing that Wesley was still death eligible under specification one for being an aider and abettor. (*Id.* at 3040-41). The jury refused the prosecutor's argument and chose the least severe sentence available for the aggravated murder charge. (*Id.* at 3377).

E. Motion to withdraw guilty plea or vacate the death sentence

Stumpf filed a motion for leave to withdraw his guilty plea, or in the alternative, vacate his death sentence on June 7, 1985. (J. App. at 204). Stumpf argued that the prosecutor's position at Wesley's trial, and particularly, the fact that the prosecutor had offered and adopted as true Eastman's testimony, demanded, at a minimum, a new sentencing hearing. (*Id.*).

The prosecutor argued in response that, "[Stumpf] admitted that he did, in fact, purposely kill Mary Jane Stout. . . ." (*Id.* at 209). The prosecutor further argued that the court "made a finding that the defendant, Stumpf, was the principal offender. . . ." (*Id.*). The prosecutor then argued in the alternative that Stumpf could have received the death penalty as an aider and abettor. (*Id.* at 209-210).

Eastman's testimony was entered into the record, but no further hearing or investigation took place. The motion was denied without comment. (Cir. Ct. App., Vol. I, at 379).

F. State Court rulings

On direct appeal the Supreme Court of Ohio held, in relevant part, "[b]y entering his guilty plea to the principle charge and to the specification under R.C. 2929.04(A)(3), appellant admitted that *he* murdered Mary Jane Stout. . . ." (Pet. App. at 170a (emphasis in original)). The court stated that, "Eastman's testimony is hearsay and, in the face of the evidence adduced at appellant's sentencing hearing, of minimal weight." (*Id.* at 171a).

The court conducted an independent weighing of the sentencing factors and found that "the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of appellant's guilty plea and the substantial evidence to the contrary adduced during appellant's sentencing hearing." (*Id.* at 173a). The court affirmed Stumpf's death sentence.

The Court of Appeals of Ohio, Fifth Appellate District, denied Stumpf's petition for post-conviction relief on July 23, 1990. (Pet. App. at 227a). The Supreme Court of Ohio denied Stumpf's appeal without comment. (*Id.* at 235a).

G. Federal Habeas Corpus rulings

Stumpf petitioned the United States District Court for the Southern District of Ohio for a *Writ of Habeas Corpus*. In his second claim for relief, Stumpf argued that his guilty plea had not been voluntary, knowing and intelligent. (J. App. at 32). Stumpf alleged in his seventh claim for relief that the trial court had improperly denied the motion to withdraw his plea. (*Id.* at 97). The district court denied both claims. The court explicitly noted that it was "troubled" by the prosecutor's conduct, but ultimately adopted the Ohio Supreme Court's after-the-fact determination that Eastman's testimony lacked credibility. (*Id.* at 101). The district court denied the petition on February 6, 2001.

The United States Court of Appeals for the Sixth Circuit granted relief and vacated Stumpf's plea and sentence on two grounds. (Pet. App. at 1-58a).[2]

SUMMARY OF ARGUMENT

The Sixth Circuit vacated Stumpf's plea and sentence on two grounds: the plea did not constitute a voluntary, knowing and intelligent waiver of his constitutional rights; and the prosecutor's failure to correct his use of materially inconsistent theories rendered Stumpf's plea and sentence unreliable, and therefore, violated due process.

The Sixth Circuit properly concluded that Stumpf's plea did not amount to a voluntary, knowing and intelligent waiver. At the time of Stumpf's conviction, an individual could not be convicted of aggravated murder in Ohio unless the state proved specific intent to cause the death of the victim beyond a reasonable doubt. OHIO REV. CODE § 2903.01(1984). Under Ohio law, a fact-finder could not infer specific intent solely from complicity; the fact-finder was required to consider all the available evidence both for and against intent. *Id.*, *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998). The only proof of intent offered at Stumpf's plea hearing, and the only evidence of intent explicitly cited by the three-judge panel that reviewed and entered Stumpf's plea, was the conclusion that Sumpf had been the principal offender. After a full review, the Sixth Circuit concluded that the record could not fairly support a conclusion that Stumpf had received "real notice of the true nature of the charge against him," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), because the record completely undermined any conclusion that Stumpf understood he was pleading to being the principal offender.

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[2] The Sixth Circuit declined to address Stumpf's remaining claims for relief in light of its decision granting relief on these two grounds. (Pet. App. at 48a).

The precedents of this Court justify the Sixth Circuit's review of the full record. In the course of its review, the Sixth Circuit determined that the record of the plea hearing itself cast serious doubt on the validity of Stumpf's plea. Petitioner argues that *Henderson* precludes a reviewing court from reviewing a plea hearing for anything other than counsel's confirmations that he has informed his client of the charges and the consequences of his plea. Petitioner constructs this rule from the presumption of regularity this Court has attached to the record of such hearings. *Henderson*, 426 U.S. at 647; *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983). According to Petitioner, only direct extrinsic evidence of a failure to explain the charge, such as an attorney admission, may rebut this presumption. Petitioner's theory of an effectively irrebuttable presumption, however, finds no support in the law. Nothing in *Henderson* or any other case supports the proposition that a reviewing court must ignore the deficient elements of a record when reviewing a plea under *Boykin v. Alabama*, 395 U.S. 238 (1969).

The Sixth Circuit reviewed the record in its entirety, and the court explicitly noted that under most circumstances the plea colloquy would enjoy a presumption of regularity. The court discovered, however, that the plea colloquy was *irregular* on its face. The colloquy exhibited confusion and uncorrected contradictions at the most significant moments. The court properly concluded that such a record could not sustain the presumption, that is, the state would have to offer something more to establish a proper plea. The Sixth Circuit further supported this conclusion with a great deal of extrinsic evidence that confirmed that the problems during the plea hearing were not mere misunderstandings. Thus, the record as a whole pointed to the single conclusion that Stumpf did not receive real notice of the true nature of the charges against him. Indeed, the Sixth Circuit concluded that the evidence far exceeded this threshold and tended to prove that the facts simply could not support the charge. Absent

any evidence to the contrary, the court had no choice but to vacate Stumpf's plea.

The Sixth Circuit also properly vacated Stumpf's plea and sentence because the prosecutor violated Stumpf's due process rights when he failed to correct his use of materially inconsistent theories to convict Stumpf and Wesley. It must be noted that Petitioner's petition for a writ of *certiorari* and brief to this Court do not address the Sixth Circuit's grant of *habeas* relief on the due process claim as to Stumpf's death sentence; Petitioner thus does not present an argument for reversing that portion of the decision.[3] Instead, Petitioner argues only that the prosecutor's inconsistent positions do not entitle Stumpf to relief from his guilty plea. (*See* Pet. Br. at i, 2, 3-4, 19-20, 35-42, 43 n.5, 46). This brief, however, will address both forms of relief.

The record clearly establishes that the prosecutor embraced materially inconsistent positions in an attempt to secure convictions and death sentences for Stumpf and Wesley. The record establishes that Stumpf was convicted as the principal offender; indeed, this theory of the crime constituted the bulk of the evidence for specific intent. The prosecutor then turned around and took the position that Wesley was the sole principal offender. At Wesley's trial the prosecutor characterized all the evidence to support his belief that Wesley alone had shot Mrs. Stout. Most significantly,

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[3] In Petitioner's Brief to this Court, she mistakenly asserts that the Sixth Circuit did not vacate Stumpf's death sentence. (Pet. Br. at 43 n.5). As discussed above, it is clear that the Sixth Circuit vacated both Stumpf's guilty plea and death sentence. Petitioner's confinement of this case to the reversal of Stumpf's guilty plea necessarily means that arguments regarding Stumpf's death sentence are not before this Court. *See* U.S. S. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). As this Court has repeatedly held, issues not presented in the petition or the petitioner's brief should not be considered "absent unusual circumstances." *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

the prosecutor offered the testimony of James Eastman, who reported that Wesley had admitted to killing Mrs. Stout after Stumpf had fled the room. The prosecutor worked to bolster Eastman's credibility during direct examination and vouched for Eastman before the jury. The jury, however, refused to accept the prosecutor's theory of the case—no doubt because they had learned that Stumpf had already been convicted and sentenced to death for the same crime, which led them to the erroneous conclusion that Stumpf had also admitted to being the shooter. The prosecutor's materially inconsistent position at Wesley's trial necessarily rendered Stumpf's plea and sentence unreliable. The failure to correct this inconsistency violated Stumpf's due process rights.

When a prosecutor embraces a theory at an accomplice's trial that directly contradicts the basis for the conviction and sentence of the first defendant, the conviction and sentence of the first defendant are rendered unreliable. More particularly, a prosecutor violates due process when he presents and vouches for evidence in the second trial that repudiates the evidentiary basis for the first conviction. *See Green v. Georgia*, 442 U.S. 95 (1979); *Miller v. Pate*, 386 U.S. 1 (1967). Absent that evidentiary basis, a reviewing court can no longer trust that the conviction is reliable. More significantly, in a death penalty case, an uncorrected inconsistent theory presents a post-sentencing event that renders the sentencing determination itself unreliable. *See Johnson v. Mississippi*, 486 U.S. 578 (1988). Thus, the prosecutor's decision to embrace the theory that Wesley killed Mary Jane Stout, which included vouching for the veracity of Eastman's testimony before the jury, completely eroded the basis for Stumpf's conviction and sentence. Faced with an unreliable conviction and death sentence, the Sixth Circuit had no choice but to vacate both.

ARGUMENT

I. The Sixth Circuit correctly held Stumpf's guilty plea involuntary under *Boykin v. Alabama* and its progeny because the record as a whole does not fairly support a conclusion that Stumpf understood the true nature of the charge to which he pleaded guilty.

In *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), this Court held that when a defendant pleads guilty the state shoulders the burden of building a record that demonstrates a voluntary, intelligent and knowing plea. In particular, the record must reveal that the defendant understood the law in relation to the facts, *Id.* at 243 n.5, and received "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (citation omitted). In *Henderson*, this Court clarified that constitutionally sufficient notice will often necessarily include clear notice of the element of intent in certain serious offenses. *Id.* at 647 n. 18. Faced with a record that demonstrates that Stumpf never received "real notice of the true nature of the charge against him," the Sixth Circuit correctly held Stumpf's plea an invalid waiver of his constitutional rights.

Once Stumpf raised the voluntariness of his guilty plea as an issue, and pointed to evidence that supported that challenge, it fell to the state to counter this charge with its own evidence. *See Boykin*, 395 U.S. at 243. As the Sixth Circuit properly recognized, the state may meet its burden if it presents a record that contains counsel's representation, or some other indication, that all constitutionally relevant matters were adequately explained to the defendant. Such a record will generally enjoy a presumption of correctness. *Henderson*, 426 U.S. at 647; *see also Marshall v. Lonberger*, 459 U.S. 422, 437 (1983). However, if the record only adds to the doubt surrounding the guilty plea, then the presumption crumbles and the state must offer something

more. *Boykin*, 395 U.S. at 243. In this case, the Sixth Circuit's careful review of the record left no reasonable basis for sustaining the presumption. As the court noted, "[g]iven the paucity – indeed, the lack – of the evidence to refute what is clear on the record, we must conclude that the state has therefore not met its burden that the plea may stand." (Pet. App. 30-31a). With no other evidence of intent; indeed, faced with a great quantity of evidence that supported Stumpf's position, a position "inconsistent with the *charge* to which he pleaded guilty," (*Id.* at 28a (emphasis in original)), the Sixth Circuit had no choice but to reverse.

A. The Sixth Circuit correctly concluded that under Ohio law aggravated murder requires a finding of specific intent.

Stumpf was charged with aggravated murder under Ohio Revised Code § 2903.01 (1984), which requires a finding of specific intent. Section (D) of the statute provides that the requisite intent may not be inferred solely from the participation in a common plan or design; the prosecution still "must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt." As the Sixth Circuit noted, the Ohio judiciary has confirmed this construction of the statute. In *In re Washington*, the Supreme Court of Ohio reiterated that the requisite intent cannot be based solely on complicity. 691 N.E.2d 285, 287 (Ohio 1998). Thus, before an individual may be convicted of aggravated murder, the prosecution must offer proof of the defendant's specific intent to cause the death of the victim.

Stumpf was convicted of aggravated murder as the principal offender. That is, the prosecution met the specific intent element by offering a theory of the crime that turned on Stumpf firing the shots that killed Mrs. Stout. Thus, Stumpf's conviction rested upon the fact-finder's conclusion that Stumpf had harbored the requisite intent because he had pulled the trigger. Therefore, this case presented the Sixth

Circuit with a conviction that rested entirely upon one theory of the case, namely that Stumpf shot Mrs. Stout, and a long-standing challenge to the voluntariness of that plea based upon Stumpf's own version of the crime—a version subsequently confirmed by the state's own evidence at the Wesley trial.

Petitioner argues that the Sixth Circuit misconstrued the statute's specific intent requirement. Petitioner's argument may be summarized as, "If Stumpf could have been convicted of aggravated murder as an aider and abettor, then nothing else matters and the plea must stand." This "could have" argument, which Petitioner offers on both counts, will be addressed below, *see infra* at II.C, but here it is important to note that, in regards to the guilty plea count, Petitioner misses the Sixth Circuit's rather straight-forward logic, and assigns the court a far more ambitious goal then the court's reasoning supports.

Petitioner asserts that "the specific theory presented is irrelevant" because a defendant is convicted of a crime not a theory. (Pet. Br. at 33). While this is true as a matter of semantics, it is a startlingly meaningless assertion once a fact-finder adopts that theory of the case. The crime to which Stumpf pleaded guilty was aggravated murder. That crime required a finding of specific intent. The prosecutor offered, and the court accepted, that Stumpf harbored the requisite intent because he had been the principal offender—that is, the man who shot Mrs. Stout. At that moment, the "theory" became the "crime." The Sixth Circuit simply recognized that Stumpf's conviction rested entirely upon the theory that he was the principal offender.

The Sixth Circuit was not attempting to re-write Ohio's law of specific intent. Indeed, despite Petitioner's characterizations to the contrary, at no point does the Sixth Circuit conclude that because Stumpf was not the principal offender he could not have been convicted of aggravated murder. (*See, e.g.*, Pet. App. at 29a). Rather, the Sixth Circuit simply elucidated the statute and the theory under

which Stumpf was convicted because these factors supplied the necessary parameters to its review of the record. The Sixth Circuit understood that whether Stumpf's plea represented a valid waiver of his constitutional rights depended entirely upon whether the record could fairly support a conclusion that he voluntarily, knowingly and intelligently pleaded guilty to the crime as charged. Thus, whether Stumpf could have been convicted as an aider and abettor *if* the prosecutor had chosen to pursue that theory bears not at all on the inquiry into the validity of the plea. Stumpf was convicted as a principal offender; therefore, the record should support a voluntary, knowing and intelligent plea to being the principal offender.

B. The record does not fairly support a conclusion that Stumpf's guilty plea was voluntary, knowing and intelligent under this Court's precedents.

In *Boykin v. Alabama*, 395 U.S. at 242-43, this Court held that only a voluntary, knowing and intelligent guilty plea will stand as a legitimate waiver of a defendant's constitutional rights. The Court explicitly placed the burden for developing a record capable of meeting this necessarily high standard upon the state. *Id.* at 243 ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation."). The Court further advised that trial courts should endeavor to "[canvas] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 244. Thus, *Boykin* recognizes that only a full review of the charges, the nature of the plea, and the defendant's level of understanding of the proceeding and its consequence will adequately serve the interests of both the state and the defendant. The process of producing a well-developed record ensures that the plea reflects a voluntary, knowing and intelligent waiver of constitutional guarantees;

the record itself preserves the efficiencies of a guilty plea by "[forestalling] the spin-off of collateral proceedings that seek to probe murky memories." *Id.* In this case, the Sixth Circuit concluded that the trial court produced a record that details a pervasive and sustained confusion rather than a voluntary, knowing and intelligent waiver of Stumpf's constitutional rights.

1. Stumpf's plea was entered despite an abiding, obvious and uncorrected misunderstanding about the true nature of both the charged offense and the proceeding itself.

The Sixth Circuit determined that the record of the plea colloquy itself created a grave doubt as to whether Stumpf's guilty plea was voluntary, knowing and intelligent. The court reasoned, "when the state court record of a defendant's plea does not demonstrate that the plea is constitutionally valid, the state has the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings . . . ." (Pet. App. at 30a). The court considered particularly significant Stumpf's obvious confusion about the nature of the proceedings, his desire to offer his version of the crime each time he was asked to acquiesce to the plea, and the fact that Stumpf's long-maintained version of the crime, the version he apparently wished to offer at the colloquy, contradicted the charge. In addition, the court also considered the ineffective assistance of counsel Stumpf received, his low IQ, and the Wesley trial. Against this, the state only offered counsel's confirmations during the colloquy that he had explained the charge to his client. In accord with *Boykin* and *Henderson*, the Sixth Circuit concluded that the state's failure to rebut the substantial evidence of an involuntary guilty plea with

anything other than the unclear and contradictory record itself mandated a finding of an invalid guilty plea.

a. Petitioner's argument that a confirmation in the record will be sufficient to counter any claim of involuntariness that is not based upon extrinsic evidence finds no support within the holding, reasoning or facts of *Henderson v. Morgan*.

The state enjoys an initial presumption that a guilty plea represented a voluntary, knowing and intelligent waiver when it presents the record of a defendant's plea proceedings. *Henderson*, 426 U.S. at 647; *Marshall*, 459 U.S. at 437. In Stumpf's case, Petitioner has offered no other evidence; it rests upon the transcript of the plea colloquy. Indeed, Petitioner argues that "defense counsel's representation on the record that he explained the elements of the offense to the defendant, especially where the defendant also acknowledges that his attorney so advised him, should be the end of the matter." (Pet. Br. at 30). Petitioner further argues that this presumption can only be overcome if "the defendant [shows] by competent, compelling extrinsic evidence that despite the record, he was not advised of the elements of the offense to which he pleaded guilty." *Id.* Thus, Petitioner argues that no matter what other evidence the record may contain, including obvious confusions and misunderstandings within the plea colloquy itself, a reviewing court must ignore these and look only to the various "Yes, sir's" scattered throughout the transcript. Such a standard comes close to an irrebuttable presumption and strays far from the standards established in *Henderson v. Morgan*.

Petitioner derives its strict standard from a misunderstanding of the facts in *Henderson*. *Henderson* does allude to a presumption of regularity for representations in

the record. 426 U.S. at 647. Petitioner argues that this presumption may only be met by "competent, compelling extrinsic evidence." Petitioner apparently bases this argument on her belief that *Henderson's* self-declared uniqueness stemmed from the fact that the *Henderson* petitioner "presented evidence *from his state court attorneys* that they 'did not explain the required element of intent.'" (Pet. Br. at 29, quoting *Henderson*, 426 U.S. at 642 (Petitioner's emphasis)). Petitioner mischaracterizes the facts. The *Henderson* court called the case unique because "the trial judge found as a fact that the element of intent was not explained to Respondent." 426 U.S. at 647. The portion of the opinion that Petitioner relies upon for the assertion that the petitioner in *Henderson* relied on evidence "*from his state court attorneys*" reads, "The lawyers gave Respondent advice about the different sentences which could be imposed for the different offenses, but, as the District Court found, did not explain the required element of intent." *Id.* at 642. Thus, the petitioner in *Henderson* did not rely on evidence from his state court attorneys, indeed the opinion contains no reference to such evidence, rather, the petitioner relied upon a district court's findings of fact following an evidentiary hearing on the issue of voluntariness. *Id.* at 640. Thus, by "competent, compelling extrinsic evidence" Petitioner apparently means a district court's findings of fact after a full evidentiary hearing.

In this case, Stumpf did not receive an evidentiary hearing. The Sixth Circuit, however, reviewed a record that included the same elements presented to the district court in *Henderson*, including: numerous affidavits from those with any knowledge of Stumpf's legal representation and plea decision, the transcripts of all relevant lower court proceedings, and psychological evaluations. Indeed, the Sixth Circuit had access to a joint appendix that ran to 2600 pages across five volumes. Exactly what "extrinsic evidence" Petitioner believes would fall beyond these parameters is unclear. Petitioner certainly cannot mean to

suggest that nothing short of a sworn admission of attorney incompetence will suffice to rebut the *Henderson* presumption. If this is indeed Petitioner's argument, she swings well wide of the mark.

It is clear that the *Henderson* presumption places a significant burden upon a defendant. However, contrary to Petitioner's interpretation, *Henderson* teaches that the presumption of voluntariness may be rebutted by evidence from the record as a whole. Thus, the record itself may create and sustain the doubt. However, that doubt must be pervasive and deep. As the Court stated in *Henderson*, "There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that Respondent had the requisite intent." *Id.* at 646. Thus, in a case like *Henderson* or Stumpf's, the essential point is not merely the fact that the record contains no clear indication that intent was explained; rather, the record should leave no principled means, within its four corners, of finding intent at all. Such a showing will demonstrate that the defendant very likely did not understand the nature of the charge, and indeed likely possessed a completely different understanding of the crime itself. Operating under such a misunderstanding, a defendant cannot voluntarily plead guilty to a crime under *Henderson*.

b. The Sixth Circuit discovered numerous points of unresolved confusion and contradiction in the record of the plea hearing itself, each of which supports the conclusion that Stumpf never understood the true nature of the charge to which he pleaded guilty.

The Sixth Circuit concluded that "the plea proceeding clearly demonstrates that the defendant did not possess an understanding of the aggravated murder charge to which he

pleaded guilty." (Pet. App. at 15-16a). The Sixth Circuit highlighted numerous points in the hearing that rendered it impossible to conclude that Stumpf understood the nature of the charge. Of particular significance is the fact that Stumpf interrupted the proceedings at the two most significant moments. When Judge Henderson initially asked Stumpf whether he understood that a guilty plea would constitute a waiver of his right to a jury trial, Stumpf's counsel answered, "Your honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court." (*Id.* at 24a). The judge responded, "Of course in the sentencing portion of this trial you do have those rights to speak on your own behalf to present evidence and testimony on your own behalf . . . . Counsel, is that satisfactory?" (*Id.*). Thus, rather than confront Stumpf's confusion and guarantee clarity on this essential point, the court deflected the matter through a non-responsive reference to Stumpf's right to present mitigation evidence at sentencing.

When Judge Henderson proceeded to solicit the actual guilty plea from Stumpf, Stumpf once again bucked. Counsel explained to the court, "Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that." (*Id.* at 25a). Once again, Judge Henderson invoked the sentencing hearing, "At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing. . . . And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation." (*Id.* at 26a). Thus, Stumpf expressed confusion at the two most important moments of

the colloquy, the two moments when he was being asked to waive a bundle of significant constitutional rights, and each time the confusion passed largely unaddressed and entirely uncorrected.

The Sixth Circuit reasonably concluded that this abiding confusion indicated that Stumpf "obviously, was reiterating his desire to challenge Petitioner's account of his actions, and had the procedure called for an immediate determination of the evidence relied upon by the state to support the defendant's imminent conviction, the misunderstanding would undoubtedly have come to light before the plea was finalized and Stumpf's fate was sealed." (*Id.*). The time to correct these misunderstandings and ensure a voluntary, knowing and intelligent plea was during the colloquy, that is, before the court accepted and entered the plea. The court and counsel allowed this moment to pass and proceeded to the evidentiary hearing on the back of an invalid guilty plea.

The fact that Stumpf offered a consistent account of the crime also contributed a great deal to the Sixth Circuit's interpretation of the plea hearing. This case does not present a silent defendant, who later claims that he did not understand, nor does this case present a defendant who pleads guilty while openly and simultaneously professing to contrary facts, *see, e.g., North Carolina v. Alford*, 400 U.S. 25 (1970), this case presents a defendant who continually expressed confusion over the course of the proceedings and consistently refused to admit to the shooting. As the Sixth Circuit expressed it, "[Stumpf's] qualification was more than temporary, and it was never addressed by the trial court." (Pet. App. at 27a).

Boykin and its progeny grant the state a presumption of voluntariness upon the presentation of a supporting record; therefore, it is incumbent upon the state to produce a sufficiently clear record. In this case, the state failed to address the rather glaring indications that Stumpf never intended, nor would he ever agree to plead guilty to shooting

the victim. Under *Boykin*, these circumstances cast serious doubt on the voluntariness of the plea, and absent significant evidence to the contrary, such a plea cannot stand. As the Sixth Circuit determined, the state offered no evidence of intent at the plea hearing beyond Stumpf's presence at the murder.[4] Given Stumpf's absolutely consistent position that he was not present at the shooting of the victim, as well as the numerous uncorrected confusions and contradictions at the plea hearing itself, the Sixth Circuit concluded that the record leaves no principled basis according to which a court could reasonably conclude that Stumpf received "real notice of the true nature of the charge against him."

2. Numerous facts and circumstances surrounding the plea also point to an invalid plea.

Following *Henderson*, the Sixth Circuit considered all the relevant facts and circumstances available in the record. *See* 426 U.S. at 647. The logic of a broad-based review is obvious. Only a review of the full record can provide the contextual moorings necessary to evaluate what weight specific evidence of either a knowing and intelligent plea or an unknowing and uninformed plea the reviewing court should grant.

The Sixth Circuit explicitly noted that the performance of Stumpf's counsel fell "outside the 'range of competence' to which the defendant is entitled." (Pet. App. at 32a, citing *Henderson*, 426 U.S. at 647). This finding is significant because it explains why the Sixth Circuit chose not to put much stock in defense counsel's confirmations on the record that they had explained the charge, its elements, and all available defenses to Stumpf. Indeed, the Sixth

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[4] The three-judge panel specifically found Stumpf to be the "principal offender" and offered no other findings on the element of intent. (J. App. at 196).

Circuit expresses wonderment and confusion at defense counsel's inexplicable choice to argue that Stumpf was not the shooter *after* allowing him to plea to the charge as the principal offender, and *after* allowing that plea to be accepted and entered by the court. (*Id.*). The Sixth Circuit also notes that regardless of whether this choice reflected ignorance of the elements of the crime or a decision to contest a requisite element *after* the conviction, such actions "manifestly constitute ineffective assistance." (*Id.*)

The Sixth Circuit also took into account the fact that Stumpf "has a low IQ and has been found to be mentally and emotionally immature." (*Id.* at 23a). This finding is significant because it renders the obvious confusions and contradictions in the transcript that much more worrisome. Indeed, this factor was specifically listed as one of the "unique" elements in *Henderson* that the court listed in response to the state's "exaggerated" fear that the decision would invite a flood of collateral attacks. 426 U.S. at 647.

The fact that the state itself developed, substantiated and presented evidence that offered proof that Stumpf was not the principal offender also informs the Sixth Circuit's review of the record. The prosecutor's case at Wesley's trial, coupled with Stumpf's unwavering account of the crime, supports the Sixth Circuit's conclusion that the problems in the record likely indicate that Stumpf never understood the true nature of the charges. More significantly, the full weight of the evidence, colored by the revelations at Wesley's trial, "[point] to the existence of at least a reasonable probability that [Stumpf] would not have pleaded guilty had he known that such a plea would have amounted to admitting that he specifically intended the death of Mary Jane Stout." (Pet. App. at 33a). This is perhaps the most startling aspect of this case. Petitioner's contention that Stumpf's plea was consistent regardless of what theory it reflected finds no support in the record. An honest and reasonable appraisal of the record in its entirety tends to indicate the exact opposite; that is, Stumpf likely could not have been convicted of the

aggravated murder of Mrs. Stout under his version of the crime. *See infra* at II.3.

II. The Sixth Circuit correctly held that Stumpf's due process rights were violated when the State convicted and sentenced him to death based on a factual theory that the State later repudiated in prosecuting Stumpf's accomplice.

This Court has never looked favorably upon prosecutors asserting inconsistent theories to secure convictions or death sentences against multiple defendants. This Court's precedents dictate that when a material inconsistency occurs, a defendant's rights under the Fourteenth Amendment's Due Process Clause are threatened. In such cases, this Court has consistently required a meaningful inquiry to determine whether the defendant's conviction or sentence were nonetheless fair and reliable. In the present case, the prosecutor secured Stumpf's conviction and death sentence by repeatedly arguing that Stumpf shot and killed Mrs. Stout, a fact that the sentencing court found to be especially significant in sentencing him to death. In the subsequent trial of Wesley, the same prosecutor relied on newly discovered evidence to argue just the opposite: that Wesley, not Stumpf, was the shooter. This Court should affirm the Sixth Circuit's decision that it is fundamentally unfair and a violation of Stumpf's rights under the Due Process Clause to allow his conviction and sentence to stand.

A. Due process requires that a defendant's conviction and sentence be re-evaluated when the prosecutor has repudiated the theory and evidence used to secure the original conviction and sentence.

Recognizing that a prosecutor's inconsistent positions can arise under a number of different factual patterns, this

Court has consistently tailored meaningful remedies to cure the constitutional errors in such cases. For instance, this Court clearly disapproved of inconsistent theories in *Green v. Georgia*, 442 U.S. 95 (1979). In that case, this Court rebuffed a prosecutor's attempt to manipulate the rules of hearsay to prevent a defendant from presenting evidence that the prosecutor previously used to convict another defendant of the same crime. *Id.* at 97. In *Green*, the State of Georgia obtained a conviction and death sentence against one defendant, Moore, for the murder of Allen. *Id.* at 96. Subsequently, Green was also convicted for the murder of Allen. *Id.* During his sentencing hearing, Green attempted to introduce the testimony of Pasby, who stated that Moore told him that he killed the victim. *Id.* This evidence would demonstrate that Green did not participate in the killing. *Id.* Although the State had presented Pasby's testimony in Moore's trial, the State objected to the evidence at Green's trial on hearsay grounds. *Id.* This Court reversed Green's death sentence, holding that the exclusion of Pasby's testimony constituted a violation of the Due Process Clause. *Id.* at 97. The testimony was "highly relevant to a critical issue in the punishment phase of the trial" and there was "ample" evidence corroborating Moore's statement to Pasby. But, "*[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.*" *Id.* at 97 (emphasis added). Thus, this Court concluded that the rules of hearsay could not be applied in that manner because it "defeats the ends of justice" to which the Due Process Clause necessarily protects. *Id.*

This Court also condemned a prosecutor's use of inconsistent theories in *Miller v. Pate*, 386 U.S. 1 (1967), a case involving a prosecutor's knowing use of false testimony. In *Miller*, the prosecutor's entire theory of the case centered on proving that a pair of red-stained shorts belonged to the defendant and that the stain was the victim's blood. *Id.* at 3. During the federal habeas proceedings, however, it was

revealed that the stain was in fact paint and that the prosecutor knew of this fact at the time of trial. *Id.* at 5. The State then argued during the habeas proceedings that everyone at trial knew the shorts were stained with paint, but this Court rejected this incredible argument and reversed the defendant's conviction. *Id.* at 6-7. Thus, *Miller* reflects the principle that the prosecutor cannot present evidence to support a conviction and then argue to a reviewing court that the evidence did not matter.

Green and *Miller* illustrate this Court's intolerance of prosecutorial attempts to subvert the truth-finding function of a criminal trial. As this Court made clear long ago, "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). This truth-seeking function of criminal trials is protected, in part, by the Due Process Clause, *see, e.g., United States v. Agurs*, 427 U.S. 97, 107 (1976) (presenting false testimony "involve[s] a corruption of the truth-seeking function of the trial process"). Thus, this Court has encountered a number of factual patterns involving the subversion of the truth-seeking function of trials and held that the defendant's rights under the Due Process Clause were implicated.[5]

Just as with these fact patterns, a prosecutor's ability to maintain verdicts based on materially inconsistent theories undermines the truth-finding process. When the prosecutor

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[5] *See Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (improper argument and manipulation or misstatement of evidence); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (use of hearsay rule to exclude evidence of the prosecutor's inconsistency in successive capital sentencing hearings); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (suppression of material impeachment evidence); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (presentation of false evidence and inconsistent argument on appeal); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of materially exculpatory evidence); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (failure to correct false testimony); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (knowing presentation of false testimony); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (same).

attempts to maintain two convictions despite the fact that the core evidence presented in support of the first defendant's conviction or death sentence is wholly irreconcilable with the core evidence used against a second defendant charged with the same crime, he offends the truth-finding process. Allowing both verdicts to stand contradicts the principal goals of convicting the guilty and freeing the innocent and severely undermines the basic fairness of criminal trials. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (recognizing "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the "twofold aim of [the law] that guilt shall not escape nor innocence suffer").

Furthermore, the use of inconsistent theories to convict different defendants falls well below the unique constitutional standards that this Court has applied to prosecutors. As this Court has long recognized, "the prosecutor's role transcends that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). In *Berger v. United States*, 295 U.S. at 88, this Court firmly stated that a prosecutor

> is the representative not of an ordinary party to a controversy but of a sovereignty ... whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Certainly when a prosecutor seeks to maintain a verdict that *he* has deemed to be false in another proceeding, he does not fulfill his constitutional duty to refrain from improper methods of producing a conviction. Without being required to correct a verdict, a prosecutor would be free to let stand a material deception on the courts. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (requiring a prosecutor to correct false testimony even when the testimony is not solicited); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (condemning the deliberate deception of the court). Furthermore, such a rule would authorize prosecutors to abandon their ethical duty to "seek justice, not merely to convict." Model Code of Professional Responsibility EC 7-13. A prosecutor who knows he has no duty to correct an inconsistent verdict will not be discouraged from obtaining other convictions, though he knows both defendants cannot be simultaneously guilty. In short, preventing prosecutors from maintaining inconsistent prosecutions is necessary to prevent criminal trials from becoming "a game in which the State's function is to outwit and entrap its quarry" rather than a search for the truth. *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

The rule against inconsistent theories applies with equal force to death sentences. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (stating that a capital sentencing hearing is like a trial on the question of guilt or innocence because the prosecution has "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts"); *Green*, 442 U.S. at 97 (Court troubled by use of hearsay rules to further an inconsistent theory during a capital sentencing hearing). As this Court has repeatedly stated, the Constitution requires heightened reliability for the death penalty determination. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 584 (1988); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986); *California v. Ramos*, 463 U.S. 992, 998 (1983). If a prosecutor's newly discovered evidence is materially inconsistent with the

evidence previously presented to secure a death sentence, that sentence does not meet this Court's standard of reliability, and it must be corrected.

The legal principle that post-sentence events can render a death sentence constitutionally unreliable is firmly rooted in this Court's decisions. In *Johnson v. Mississippi*, 486 U.S. 578, 582 (1988), one of the defendant's prior felonies that formed the basis for an aggravating factor was invalidated after the death sentence was imposed. Thus, this Court held that the defendant was entitled to a new sentencing hearing because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590. Furthermore, the evidence of the conviction prejudiced the defendant because the prosecutor "repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances." *Id.* at 586. Like the reversal of the New York conviction in *Johnson*, a prosecutor's total repudiation of an earlier theory renders the evidence from the first case "materially inaccurate." This creates an impermissible risk that a defendant has been sentenced to death arbitrarily, and this Court's precedent dictates that the defendant is entitled to a new sentencing hearing.

This rule against inconsistent theories does not necessarily mean that a prosecutor must select a version of the facts and thereby become forever bound by that version of events. Where the evidence is ambiguous regarding a material fact, the prosecutor certainly acts within constitutional bounds by asserting the ambiguity to a fact-finder. The prosecutor may not, however, manipulate the ambiguous evidence to obtain multiple convictions.

Furthermore, a prosecutor's hands are not tied in the event that he discovers new evidence that is inconsistent with his theory in the original case. Indeed, the prosecutor may use that evidence to secure a second verdict. In doing so, however, he is deemed to believe that the new evidence is reliable (in light of the earlier inconsistent evidence and the

prosecutor's constitutional duty to refrain from knowingly presenting false evidence). In that case, where the prosecutor has wholly repudiated the theory upon which he secured the earlier verdict, the first defendant is entitled to a due process inquiry to ensure that the result of his proceeding is a correct and just one. *See Mooney*, 294 U.S. at 113 (rejecting the State's argument that it was "not required to afford any corrective judicial process to remedy the alleged wrong."); *see also Thompson v. Calderon*, 120 F.3d 1045, 1071 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("In the case of mutually inconsistent verdicts, . . . I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts.").

The Sixth Circuit properly decided to apply the same standard of review applied in other cases involving due process violations based upon a potentially tainted truth-finding process. (Pet. App. at 45a). *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Bagley*, 473 U.S. at 682. Under this standard, a court inquires whether there is a reasonable probability that, had the evidence been presented, the outcome of the proceeding would have been different. As this Court explained in *Kyles*, 514 U.S. at 434, this standard does not require a defendant to demonstrate that the evidence would have resulted in a complete acquittal. Nor does this standard inquire into whether the remaining evidence would have been sufficient to sustain the verdict. *Id.* at 434-35. Instead, the question is "whether in [the] absence [of the evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. Thus, a reasonable probability is shown when the evidence "undermines confidence in the outcome of the trial." *Id.* Where a defendant's conviction or death sentence is based on evidence and argument that conflicts with the evidence and argument used by the prosecutor to secure the conviction of a second defendant, a court should be required to inquire whether the outcome of the first defendant's trial has been

undermined by the material inconsistency. If so, then the defendant is entitled to a new sentencing hearing or trial.

In her brief to this Court, Petitioner mischaracterizes both the nature of the constitutional violation that results from an uncorrected use of inconsistent evidence and theories as well as the applicable standard of review. First, Petitioner reduces the issue to "some species of 'actual innocence' claim" in the mold of *Herrera v. Collins*, 506 U.S. 390 (1993). (Pet. Br. at 42). However, these claims differ markedly. In *Herrera*, this Court held that a defendant's claim of actual innocence was not cognizable in federal habeas absent an independent constitutional violation. *Id.* at 393. In an inconsistent theories case, however, the aggrieved defendant's claim is not that he is actually innocent of the crime. Instead, the claim is that if the defendant's verdict is allowed to stand, the prosecutor will have obtained two convictions on wholly inconsistent theories in violation of the Due Process Clause. The State's interest in finality—which compelled this Court's decision in *Herrera*, 506 U.S. at 417; *see also id.* at 426 (O'Connor, J., concurring)—is simply non-existent when it is *the prosecutor* who obtains new evidence and, finding it reliable, uses it to convict a second defendant on a theory that is irreconcilable with the first defendant's conviction.

When a prosecutor presents evidence at a criminal trial, that evidence is more constitutionally significant than evidence brought forth by a defendant to support a post-trial claim of actual innocence. First, when a prosecutor presents evidence at a trial, the fact-finder will not view with the same degree of skepticism that will greet evidence presented by a defendant on Death Row protesting his innocence. *See id.* at 423 (O'Connor, concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). Also, when the prosecutor introduces evidence against a defendant, that evidence is subject to the scrutiny of opposing counsel and a finder of fact and thus, he puts the credibility of the State behind that position. *See*

United States v. Young, 470 U.S. 1, 18 (1985) (recognizing that "the prosecutor's opinion carries with it the imprimatur of the government"). In addition, the prosecutor has a constitutional duty to refrain from knowingly introducing false testimony and to correct testimony learned to be false, *Napue*, 360 U.S. 264, 269 (1959); *Mooney*, 294 U.S. 103, 112 (1935), as well as a number of ethical duties to promote the search for the truth. *See* Bennett L. Gershman, *The Prosecutor's Duty to the Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001). Thus, this Court's decision in *Herrera* presents no hurdle to the due process claim asserted in this case.

Petitioner also applies the incorrect standard of review for due process violations by arguing simply that Stumpf *could have been* convicted of aggravated murder and sentenced to death, even under his version of the events. (Pet. Br. at 36). This argument, however, does not follow the "reasonable probability" standard for assessing due process violations. In *Kyles*, 514 U.S. at 434-35, this Court affirmed that a defendant "need not demonstrate after discounting the [excluded evidence], there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." This standard was similarly described in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (emphasis added), in which this Court held, "*We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.* The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Therefore, as this Court has indicated, it is irrelevant whether a defendant *could have been* convicted and sentenced to death anyway. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 289-90 (1999); *Bagley*, 473 U.S. at 682.

The Sixth Circuit's conclusion that a prosecutor's use of wholly inconsistent theories to obtain verdicts against

multiple defendants violated the Due Process Clause is reinforced by other circuit courts that have similarly applied this Court's precedent.[6] Other judges,[7] commentators,[8] state courts,[9] and two members of this Court[10] have reached the same conclusion. This Court should make this trend law.

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[6] *Smith v. Groose*, 205 F.3d 1045, 1051 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538, 566 (1998). *But see Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995) (prosecution's theories not inconsistent because both defendants could have been convicted under the law of parties). A number of other circuit court decisions have addressed the issue but did not find an inconsistency based on the facts of the particular cases. *See, e.g., Shaw v. Terhune*, 380 F.3d 473 (9th Cir. 2003); *United States v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001); *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000). Some federal courts have addressed the issue on an evidentiary level, requiring the admission into evidence of a prosecutor's prior inconsistent arguments. *See United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991); *United States v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988); *United States v. Bakshinian*, 65 F. Supp. 2d 1104, 1109 (C.D. Calif. 1999).

[7] *Thompson*, 120 F.3d at 1063 (Tashima, J., concurring) (finding a due process violation but requiring a finding of which theory is true); *id.* at 1071 (Kozinski, J., dissenting) ("In the case of mutually inconsistent verdicts, ... I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts."); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring) ("Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth."); *United States v. Butner*, No. 98-00174-01-CR-W-1, 2000 U.S. Dist. LEXIS 18005 (W.D. Mo. Nov. 14, 2000).

[8] *See, e.g.*, Barry Tarlow, *RICO Report: More Prosecutorial Double-Speak*, 27 CHAMPION 52, 61 (2004); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423 (2001); Michael Q. English, *Note: A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525 (1999).

[9] *In re Sakarias*, No. S082299, 2005 Cal. LEXIS 2309 (Cal. March 3, 2005); *State v. Gates*, 826 So. 2d 1064 (Fla. Dist. Ct. App. 2002).

B. The prosecutor's evidence and theory at Wesley's trial were materially inconsistent with the evidence and theory used to convict and secure the death sentence for Stumpf.

During both Stumpf's guilty plea hearing and sentencing hearing, the prosecutor argued vigorously that Stumpf shot and killed Mrs. Stout. *See supra* at 8-9. After Stumpf had been convicted and sentenced to death, the prosecutor discovered new evidence from Wesley's cellmate, Eastman, that showed Wesley was the actual shooter. *See supra* at 10. The prosecutor repudiated his earlier theory and sought a conviction and death sentence against Wesley for shooting Mrs. Stout. *See supra* at 9-10. To use Eastman's testimony in this way, the prosecutor clearly considered it reliable evidence that Wesley—and not Stumpf—shot Mary Jane Stout. *See Green v. Georgia*, 442 U.S. at 97 (describing the prosecutor's obvious belief in the reliability of evidence used to sentence a defendant to death); *Alcorta*, 355 U.S. at 31 (1957) (forbidding the prosecution's knowing presentation of false testimony). Thus, the Sixth Circuit correctly found that the prosecutor asserted inconsistent theories in violation of the Due Process Clause.

Despite the glaring inconsistencies, Petitioner first argues that the prosecutor's positions were consistent because the state *could have* prosecuted Stumpf for aggravated murder under an aider and abettor theory. This argument is addressed *supra* at A.1 and *infra* at B.3. The relevant consideration, however, is not what the state could have argued, it is what the state did argue.

Petitioner next argues that the theories are consistent because the prosecutor also argued that Wesley could be

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[10] *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of *certiorari*).

convicted and sentenced to death as an aider and abettor. Petitioner's argument on this point consists of a single paragraph and reduces to this assertion, "[I]n closing, the prosecutor, recognizing that the jury may not find a jailhouse informant credible, expressly argued that Wesley was guilty *either* as the shooter *or* because of his criminal complicity in Stumpf's actions." (Pet. Br. at 37). While it is true that the prosecutor talked to the jury about the aider and abettor option during closing arguments at the guilt phase, the transcripts of the Wesley trial demonstrate that the prosecutor's position throughout the trial was that Wesley was the principal offender.

The prosecutor took the position that Wesley was the actual shooter and he shaped his entire case to support that position. *See supra* at 9. Clearly, the prosecutor believed that Eastman's testimony and the other evidence were sufficient to prove beyond a reasonable doubt that Wesley had been the principal offender. The prosecutor's case, however, ran up against Defense Exhibits 2 and 3 – Stumpf's guilty plea and death sentence. Defense counsel referred to these exhibits numerous times during the trial. (Wesley Trans. 3152-53, 3155, 3157, 3158, 3163, 3165, 3326, 3331, 3335, 3339). Indeed, this appears to have been defense counsel's primary strategy. Confronted with Exhibits 2 and 3, and defense counsel's argument that Stumpf's plea necessarily meant that he shot Mrs. Stout, the jury refused to find Wesley guilty of the principal offender specification. After the jury rebuffed the prosecutor's primary theory, the prosecutor had no choice but to revert to his fallback position, aider and abettor, in order to attempt to secure the death penalty for Wesley. Although the prosecutor was willing to convict and execute two different men for shooting the same victim, even though there is no dispute that only one of the men actually shot the victim, the jury was not; it elected the least severe of the available penalties for Wesley.

C. There is a reasonable probability that Stumpf would not have been found guilty of aggravated murder and would not have been sentenced to death in light of the prosecution's inconsistent positions.

As described above, once a court finds that the prosecutor has presented materially inconsistent positions, it should then consider the prejudice resulting from the inconsistency. Specifically, the court should evaluate whether there is a reasonable probability that the results of the first trial and sentencing hearing would have been different if the State had utilized the same theory and evidence it employed in the second trial and sentencing hearing. As explained below, the answer to both questions in Stumpf's case is "yes."

1. There is a reasonable probability that Stumpf would not have been convicted of aggravated murder.

Petitioner contends that Stumpf may not challenge his conviction because he pleaded guilty to the charges against him, comparing Stumpf's case to *Mabry v. Johnson*, 467 U.S. 504 (1984). This argument, however, is flawed because Stumpf's claim does not rest upon procedural defects in the plea itself but rather the constitutional error that occurred at the motion to withdraw the plea or vacate the death sentence. At that time, the three-judge panel failed to remedy the constitutional error resulting from the prosecutor's repudiation of the theory he had used against Stumpf. As this Court has explained, when a defendant has pleaded guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.*" *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (emphasis added). Because Stumpf's due process claim is not the type of "antecedent" challenge to a

guilty plea that this Court has foreclosed in other cases, the claim is cognizable in a federal habeas proceeding. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (upholding a vindictive prosecution claim despite a plea of guilty).

In cases involving a guilty plea, a due process challenge to the conviction requires the defendant to show "that there is a reasonable probability that … he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In this case, there is a reasonable probability that the three-judge panel would have rejected Stumpf's plea of guilty to aggravated murder charges if it had considered Eastman's testimony.

As described above, one of the required elements of aggravated murder in Ohio is that a defendant must be "specifically found to have intended to cause the death of another." OHIO REV. CODE § 2903.01(D). Petitioner's argument hinges on the fact that the prosecution is not required to prove that the defendant was the actual shooter. While this fact is true—the Sixth Circuit also noted this fact, (Pet. App. at 29a)—Petitioner ignores other aspects of Ohio law. The Ohio aggravated murder statute describes a number of circumstances from which fact-finders may infer specific intent to kill, such as a defendant's participation "in a common design with others to commit the offense by force or violence." OHIO REV. CODE § 2903.01(D). However, the statute also states that "the inference is nonconclusive" and that a fact-finder must consider *all* evidence, including the defendant's lack of intent to kill. *Id.* Although it is possible that specific intent may be inferred from, for example, a common design, a fact-finder cannot ignore strong evidence that negates specific intent. *In re Washington*, 691 N.E.2d 285, 287 (Ohio 1998), a case heavily relied upon by Petitioner, reaffirms this proposition, stating, "[i]n weighing the evidence, the fact-finder remains bound to consider all evidence of the defendant's intent to kill, including the defendant's evidence on lack of intent to kill."

During Stumpf's guilty plea hearing, the prosecution's primary evidence of Stumpf's specific intent to kill Mrs. Stout was its argument that Stumpf actually committed the shooting. (Pet. App. at 45-46a). Responding to Stumpf's challenge to the element of intent, the prosecutor stated, "as to a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It seems to me that shooting a person four times shows what your intent was." (J. App. at 163-64). In light of Eastman's testimony that Stumpf did not shoot Mrs. Stout, the State's case for specific intent falls apart.

Although Petitioner points to other circumstances from which Stumpf's specific intent could be inferred, the inferential links are weak. Petitioner argues that because Stumpf shot Mr. Stout, "[i]t would be surprising, and perhaps inconceivable, that Stumpf … would have objected to killing Mrs. Stout." (Pet. Br. at 25). Petitioner argues that Stumpf would not have "objected" to killing Mrs. Stout because she was a witness to the robbery and attempted shooting. However, the prosecution's evidence indicated that Stumpf shot Mr. Stout only after a struggle that began when Mr. Stout lunged at Stumpf. The fact that Stumpf did not initiate the physical struggle with Mr. Stout prior to his shooting suggests a lack of specific intent to kill Mrs. Stout. In addition, according to Eastman, Stumpf "panicked" and dropped the gun after shooting Mr. Stout. (J. App. at 241). Furthermore, he was not even present in the house when Wesley shot Mrs. Stout. (Cir. Ct. App., Vol. IV, at 2137). In short, almost no evidence that Stumpf specifically intended to kill Mrs. Stout exists.

Thus, there is a reasonable probability that Stumpf would not have been found guilty of aggravated murder if he had proceeded to a trial. Although other evidence exists to allow an inference of Stumpf's specific intent, a fact-finder could not have ignored the other evidence indicating that Wesley shot Mrs. Stout after Stumpf panicked and left the house. This evidence, adduced at Wesley's trial, certainly

undermines confidence in the outcome of Stumpf's trial and renders his conviction a violation of due process.

2. There is a reasonable probability that Stumpf would not have been sentenced to death.

As noted above, Petitioner is only raising before this Court the question of whether the Sixth Circuit erred in vacating Stumpf's guilty plea as a result of the prosecutor's use of inconsistent theories and evidence in Wesley's case. Petitioner has not challenged the Sixth Circuit's additional conclusion that Stumpf is also entitled to relief as to his death sentence, and so has not addressed the impact of the prosecutor's use of inconsistent theories on Stumpf's death sentence. The State's acquiescence in this regard is understandable because, as described above, it is clear that the primary basis for the three-judge panel's decision to sentence Stumpf to death was its acceptance of the prosecutor's theory and evidence that Stumpf was the actual shooter. Specifically, during the mitigating phase, both the prosecutor and defense counsel argued at length about whether Stumpf had in fact shot Mrs. Stout. Defense counsel attempted to prove, as mitigation under OHIO REV. CODE § 2929.04(B)(6), that Stumpf was not the principal offender in the offense. (J. App. at 176-80). However, as described above the prosecutor repeatedly challenged this argument, stating, for example, there was "ample, ample evidence in this record to make the reasonable inference that this defendant shot both individuals." (J. App. at 187). *See supra* (describing the prosecutor's reliance on the theory that Stumpf was the actual shooter).

Furthermore, the three-judge panel accepted the prosecutor's theory that Stumpf shot Mrs. Stout, citing as its first reason for sentencing Stumpf to death the fact that "[t]he Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment."

(Pet. App. at 219a). The importance of the prosecutor's theory in securing Stumpf's death sentence was underscored when Judge Bettis, one of the original members of the sentencing panel, stated at the hearing on Stumpf's motion to withdraw his guilty plea or, in the alternative, to set aside his death sentence:

> If we had not been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

(Pet. App. at 275a). The important role that this finding played in the sentencing panel's decision to impose the death sentence was likewise recognized by the district court, (Pet. App. 90a) ("a very substantial reason"), as well as the Sixth Circuit. (Pet. App. at 46a).

Petitioner, depending on which conviction she is trying to obtain or maintain, has argued that Eastman's testimony is simply not credible. First, as discussed above, this type of duplicitous argument is foreclosed by this Court's decision in *Green v. Georgia*, 442 U.S. at 97.[11] Furthermore, the fact that Wesley was not sentenced to death does not mean that the Wesley jury considered Eastman's testimony on a clean slate and found it not credible. During the trial, Wesley's attorney presented evidence to the jury that Stumpf already had pleaded guilty and had been sentenced to death for the aggravated murder of Mrs. Stout. (Wesley Trans. at 3152). During closing arguments, Wesley's counsel

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[11] It is important to recall that the Ohio Supreme Court refused to consider Eastman's testimony because it was hearsay. (Pet. App. 173a). This is precisely the basis upon which this Court reversed the defendant's death sentence in *Green v. Georgia*, 442 U.S. 95, 97 (1979).

repeatedly referred to Stumpf's plea as an admission that Stumpf killed Mrs. Stout. He stated, for instance, "[Wesley] didn't intend to kill her. He didn't kill her. John David Stumpf did. Those entries show it." (*Id.* at 3163). At the end of his closing argument, he said,

> I submit to you that Mrs. Stout's death has come to justice by the plea of the person who pleaded guilty to the charge of aggravated murder, John David Stumpf, and those entries will show to you the sentence he received—the death penalty—and also his admission of the involvement of the shooting two time by the evidence of Mr. Stout. He pleaded guilty to those things.

(*Id.* at 3165). In light of this evidence, it cannot be seriously contended that an open-minded fact-finder found Eastman to be unbelievable. The jury's assessment of his testimony was eclipsed by the overwhelming evidence that the actual killer already was on Death Row and thus, justice had been done.

It is, of course, not surprising that the prosecutor relied so heavily on the theory that Stumpf was the shooter in attempting to secure the death penalty, or that the three-judge panel cited its acceptance of the prosecutor's theory as being its first reason for sentencing Stumpf to death. As the Ohio Supreme Court recently observed, "[v]ery few sentences have been approved against persons who were not the principal offender." *State v. Green*, 738 N.E.2d 1208, 1224 (Ohio 2000). In fact, nationwide statistics indicate that the death penalty is rarely imposed when the defendant does not actually kill the victim. *See Death Row U.S.A.*, Sept. 1, 1999, at 20 (showing that only 2.8 percent of all persons executed in the United States between 1976 and 1999 were not the "triggerman" in the crime); *Enmund v. Florida*, 458 U.S. 782, 795 (1982) (noting a study concluding that only 5.5

percent of the persons sentenced to death at the time "did not participate in the fatal assault of the victim").

In this case, if a reasonable sentencing panel had learned of Eastman's testimony, the evidence would have demonstrated at best that Stumpf was an aider and abettor to Mrs. Stout's murder. As this Court recognized in *Lockett v. Ohio*, 438 U.S. 586, 608 (1984), in which the defendant did not kill the victim, the degree of participation in an offense is precisely the type of evidence that can justify a sentence less than death. *See also Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (stating that the death penalty is less justified for defendants who played a relatively less significant role in the murder). The Ohio Supreme Court also has found the fact that a defendant was not the principal offender to be "a powerful mitigating factor." *State v. Green*, 738 N.E.2d 1208, 1224 (Ohio 2000). Perhaps the best proof of this is that Wesley's jury, which found Wesley to be an aider and abettor to Mrs. Stout's murder, gave Wesley the least severe of the possible sentences.

Finally, the Ohio Supreme Court's independent review of Stumpf's death sentence, (Pet. App. at 172-73a), simply could not cure the constitutional error resulting from the prosecutor's pursuit of inconsistent prosecutions. While this Court has upheld appellate reweighing as a remedy for consideration of an invalid aggravating factor, *Clemons v. Mississippi*, 494 U.S. 738, 744 (1990) (rejecting the petitioner's claim that "it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance"), it has never held that appellate reweighing suffices to cure a due process violation that occurs during sentencing. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 394-95 (2000) (applying the reasonable probability standard to the prejudice prong of a claim of ineffective assistance of counsel at the capital sentencing phase). Thus, the Ohio Supreme Court's reference to Eastman's testimony when conducting its independent weighing and proportionality

review did not remedy the constitutional error corrupting Stumpf's death sentence.

Furthermore, the fact that the Ohio Supreme Court found Eastman's testimony "of minimal credibility," (Pet. App. at 173a), has little impact in these habeas proceedings. First, the logic supporting that finding is contrary to the rationale underlying this Court's decision in *Green*, 442 U.S. at 97, where the testimony the defendant wished to present was obviously reliable because the prosecutor used it as its key evidence to secure an earlier death sentence. In this case, the same prosecutor used Eastman's testimony as key evidence in its attempt to procure an aggravated murder conviction and death sentence against Wesley. Furthermore, credibility determinations made by appellate courts are not the types of findings generally entitled to deference under 28 U.S.C. § 2254(d). *See Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("a reviewing court, which analyzes only the transcripts ..., is not as well positioned as the trial court is to make credibility determinations"); *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1976).

Even if the Ohio Supreme Court was entitled to make a credibility determination, however, its finding was based on clearly erroneous factual assumptions. Specifically, the Ohio Supreme Court explained that it found Eastman's testimony "of minimal credibility, especially in light of [Stumpf's] guilty plea and the substantial evidence to the contrary adduced during [Stumpf's] sentencing hearing." (Pet. App. at 173a). With regard to the former, even Petitioner has conceded that the fact that Stumpf pleaded guilty to aggravated murder was "factually and legally consistent" with Eastman's testimony that Stumpf was not the person who shot and killed Mrs. Stout. (Pet. Br. at 25). To put it differently, Stumpf's guilty plea in no way undercut the credibility of Eastman's testimony that Wesley was the shooter. The Ohio Supreme Court's discounting of Eastman's testimony due, in large part, to Stumpf's guilty

plea, was, therefore clearly erroneous and not supported by the record.

The Ohio Supreme Court's second basis for discounting Wesley's testimony—that there supposedly was "substantial evidence" that Stumpf was the shooter—is similarly lacking support in the record. In fact, although the evidence shows that Stumpf possessed the gun before and after the victim was shot and killed, there is absolutely no evidence that Stumpf had the gun when Mrs. Stout was shot and killed. To the contrary, the only evidence on this point at Stumpf's sentencing hearing was Stumpf's testimony that he panicked and dropped the gun after shooting Mr. Stout, evidence which is entirely consistent with Eastman's testimony. (Pet. App. at 44a n.11). Therefore, because "the record in the State court proceeding, considered as a whole, does not fairly support such factual determination," it is not entitled to deference by this Court. 28 U.S.C. § 2254(d)(8). *See also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (declining to grant deference to state court findings based in part on erroneous and unsupported assumptions); *Parker v. Dugger*, 498 U.S. 308, 316, 320 (1991) (refusing to grant deference to a state court finding that the trial court found no mitigating circumstances because the finding was "against the weight of the evidence" and "not fairly supported by the record"). Accordingly, the Sixth Circuit's decision should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit.

Respectfully submitted,

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